United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. ———

NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT, ET AL., Minority Stockholders,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

CHARLES E. SCHMIDT, ET AL., Minority Stockholders of the Northern Pacific Railroad Company,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, AND NORTHWESTERN IMPROVEMENT COMPANY IN OPPOSITION TO PETITIONS FOR APPEAL.

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BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, AND NORTHWESTERN IMPROVEMENT COMPANY IN OPPOSITION TO PETITIONS FOR APPEAL.

Certain stockholders of Northern Pacific Railroad Company submit petitions for allowance of appeals to this court

from orders referred to in their papers that were entered in the suit pending in the United States District Court for the Eastern District of Washington, Northern Division, entitled "United States of America versus Northern Pacific Railway Company, et al, Defendants, in Equity No. E-4389. The suit had been in progress more than seven years when these stockholders, on August 25, 1937, took the first step for being heard in the case. In order to assist this court in consideration of the reasons that we urge why these petitions ought to be denied, we will make a short statement about the nature of the suit and the proceedings therein taken.

June 25, 1929, Act of Congress approved (C. 41, 46 Stat. L. 41) directing the Attorney General to institute suit for determination of controversies and the rights of the parties arising out of land grants made to Northern Pacific Railroad Company by Acts of Congress of July 2, 1864 and May 31, 1870. The Act specified a number of issues that were to be raised, and it provided "any case begun in accordance with this Act shall be expedited in every way and be assigned for hearing at the earliest practicable day in any court in which it may be pending."

July 31, 1930, bill of complaint filed.

June 25, 1931, certain amendments to bill of complaint made.

July 18, 1931, amended and supplemental answer of defendant, Northern Pacific Railway Company, filed.

January 18, 1932. motion filed to quash return of service upon the "Northern Pacific Railroad Company, as reorganized in 1875."

Motion of plaintiff filed to strike from record disclaimer of Northern Pacific Railroad Company.

February 25, 1932, order entered appointing Special Master and referring to him for consideration and report thereon pending motions, defenses in point of law arising upon the face of the complaint and certain other defenses made in the amended answers.

April, 1932, testimony taken by Master at Washington, D. C., New York City and Missoula, Montana, and in May at Spokane.

May, 1932, oral argument before the Master by counsel for the Railway Company upon the defenses above mentioned. In the course of the hearing attention was given to the motion to strike the disclaimer of Northern Pacific Railroad Company. The Master indicated his ruling would be that it should be stricken. Thereupon, May 9, 1932, answer of Northern Pacific Railroad Company was filed, adopting the amended and supplemental answer of the Railway Company. The court entered an order referring to the Special Master the defenses raised by the Railroad Company. From and after the date of filing its answer, Northern Pacific Railroad Company has joined in all proceedings in the suit, having the same counsel as those appearing for the Railway Company and the Improvement Company. Counsel for plaintiff, after the oral argument above named, filed an elaborate written argument and brief.

May 31, 1933, report of the Special Master filed. The parties filed exceptions to the report and in January, 1934, the court heard arguments on exceptions, followed by submission of briefs.

October 3, 1935, order entered overruling all exceptions and adopting the Master's report. This order was amended by an order of January 29, 1936, that postponed consideration of an issue raised by the two trust companies.

April 21, 1936, amended order of reference entered. The Master was directed to hear the evidence and report on all issues except the issue of the value of lands for which any party might be entitled to compensation. Thereafter the Master held several hearings for taking testimony. Several hundred pages of testimony were taken, and more than 450 exhibits were introduced in evidence.

May 22, 1936, Act approved (C. 444, 49 Stat. 1369) authorizing direct review on appeal by any party by Supreme Court of the United States of the order or decree entered on review of the report of the Master pursuant to the order of April 21, 1936, and of the order or decree entered October 3, 1935, as amended by the order of January 29, 1936.

July 26, 1937, report of the Special Master pursuant to the order of reference of April 21, 1936. Within due time the exceptions of the parties to the report were filed.

August 25, 1937, these stockholders filed a motion for an order extending for thirty days the time "within which said Railroad Company may file exceptions to the report of Commissioner Frank H. Graves."

September 3, 1937, these stockholders, without asking leave of court, filed a paper entitled "Answer and Cross-Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders of Said Railroad Company". Motions were filed by plaintiff and by the Railway Company and other defendants to strike said pleading from the files.

December 18, 1937, Mr. Edmiston, of counsel for said stockholders, stated in open court that he and his associates wished to argue motion for leave to interpose the answer and cross-bill at the time set for arguments on the exceptions.

January 31, 1938, these stockholders filed a motion for leave to file a petition entitled "Petition of Charles E. Schmidt and Other Stockholders of the Northern Pacific Railroad Company to Intervene On Their Own Behalf and On Behalf of All Other Stockholders Similarly Situated."

March 7, 1938, the day set for commencement of argument on exceptions, the court listened to counsel for these stockholders on their motions through the forenoon session, and announced its ruling. Order denying the motions was filed March 9. Arguments on the exceptions were had until March 17. On the afternoon of that day the court again heard counsel for the stockholders on motions they had filed, one of said motions being to dismiss the Government's complaint and amended complaint. Said counsel completed their arguments and the court stated that the motions were denied.

March 22, the order was filed denying the motions of the stockholders, and also order was filed that contains rulings on certain of the exceptions.

March 23, 1938, these stockholders presented two petitions for allowance of appeals to the Supreme Court of the United States. The court allowed the petitions and signed citations. On March 30, 1938 the court, on its own motion, entered an order vacating the allowance of the petitions for appeal and the citations, and setting a date for argument on the allowance of said petitions.

April 30, 1938, order entered after arguments denying petitions of stockholders for appeal to Supreme Court.

May 16, 1938, Supreme Court denied petitions of said stockholders for appeal.

I. The orders denying leave to intervene are not appealable. They are discretionary orders. No right of any stockholder of the Railroad Company is finally determined by the orders.

The order entered March 9, 1938, denied the motion for leave to file and serve the answer and cross-bill and struck said document from the files, and denied the motion for leave to file the intervening petition of Charles E. Schmidt and others and struck said document from the files. The order entered March 22, 1938 denied the motion to dismiss the complaint and amended complaint of plaintiff, denied the motion to revise and amend the order of March 9, 1938, and denied the motion to amend the cross-bill and answer by making a part of it the intervening petition. The two orders show on their face that they do not finally dispose of any right of these four stockholders or any stockholders of the Railroad Company. The order of March 9, 1938, contains this provision:

> *"It Is Further Ordered,* that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The order of March 22 provides:

> *"It Is Further Ordered,* that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased,

Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The general rule is that an order denying leave to intervene in a pending suit is a discretionary one and that it is not appealable. These stockholders cannot point to any circumstance that brings them under an exception to that general rule. They do not, in any pleading filed, charge the Railway Company or Railroad Company with any bad faith in the conduct of the litigation. In the answer and cross-bill and intervening petition there are allegations about the Railroad Company being held in captivity and that the Railway Company is seeking, in this litigation, to obtain additional land and compensation for lands that rightfully belong to the Railroad Company, the federal corporation. But there is no claim that the Railway Company and Railroad Company have not in good faith defended this suit, and no claim is made that the Railway Company is not putting forth or has not put forth every possible effort to procure every acre, or pay for every acre, that the grantee was entitled to under the Act of July 2, 1864, and Joint Resolution. No fund is being administered by the court. As pointed out in a decision of this court, hereafter quoted, it cannot be known whether there ever will be a fund for distribution in this suit until after the decision of the United States Supreme Court on the appeals expected to be taken

after the decree is entered upon the review of the Master's last report.

In assignment of error No. XVIII filed by these stockholders in the Supreme Court with the petitions for appeal (and this same assignment No. XVIII was included in those filed in the District Court), reference was made to a suit pending in the Circuit Court of the United States for the Southern District of New York. The assignment in part was:

> "That the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the court in the name of the executor of the plaintiff."

That suit was brought by one Joseph Hoover against the Northern Pacific Railway Company and a number of individuals. Mr. Hudson, of counsel for these stockholders, is representing plaintiff in the Hoover suit. In the argument before Judge Webster last March, counsel for these stockholders asserted that said stockholders were participating in the Hoover suit. In the same assignment of error above referred to, it is alleged:

> "and further these petitioners had since 1900 continuously sought a Congressional Investigation so as to obtain the facts set out in the answer and cross-bill and intervening petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and petitioners believe they can state, without fear of successful challenge, that but for the continuous

acts and efforts of the petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the petitioners and information they furnished the Government."

(Assignment of Error No. XXI filed with petitions for appeal in this Court is similar to above assignment No. XVIII.)

It follows that since 1900 there has been nothing to prevent these stockholders from asserting their rights either in the Hoover suit or in some other suit brought for the purpose.

In *Credits Commutation Co. v. United States,* 177 U. S. 311, the court says:

"The view of the Circuit Court of Appeals was that the order of the Circuit Court refusing leave to intervene was not a final judgment or decree from which an appeal could be taken, and that, at any rate, the action of the lower court in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention." (p. 314)

"The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:

" 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order

not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.'" (pp. 315-16)

(The above decision is cited and followed in *New York City v. New York Telephone Company,* 261 U. S. 312 and *New York City v. Consolidated Gas Company,* 253 U. S. 219.)

In *O'Connell v. Pacific Gas & Electric Co.,* (9th C. C. A.) 19 Fed. (2d) 460, this court says:

"The appellant, in view of the fact that his individual claim against the gas and electric company in any separate proceeding is barred by the statute of limitations, contends that the intervention here sought is his only remedy to recover the money taken from him by the gas and electric company, and that he has an absolute right to intervene." (p. 460)

"It is to be remembered that there is here no impounded fund in the possession of a court, to be disbursed at the end of pending litigation.

* * * * *

"Here neither fraud, bad faith, bad judgment, nor conspiracy is shown on the part of the municipal authorities, who represent all of the gas consumers. The application for leave to intervene rests upon no statute or other authority than the federal equity rules. The appellant is represented in the litigation by the city

and county of San Francisco, as are all other consumers of gas whose rights are involved." (p. 461)

In *Barceloux v. Buffum* (9th C. C. A.) 51 Fed. (2d) 82, on pages 84-85, this court says:

"If the appellant by reason of the contract of herself and her husband with the defendant corporation retains a life interest or any interest whatever, in the property of the corporation, any sale of property of the corporation would, of course, be subject to this claim, and the purchaser would take it with that burden. She could not be injured by a sale of property of the corporation, subject to her right to the income derived therefrom. On the other hand, if her claim to the income of the property, or to an amount equal thereto, merely constitutes her a general creditor of the corporation, her right to intervene depends upon the right of a general creditor of a corporation to intervene in an action brought by another general creditor to obtain a money judgment, at law or in equity, where it is believed and claimed that the liquidation of the indebtedness due the creditor bringing the suit will render the defendant debtor a bankrupt. No case going this far has been cited or discovered. Where a debtor is acting in good faith in making his defense to a creditor's action against him, there is no occasion for, or right of, intervention by another general creditor.

* * * * *

"We are not concerned on this appeal from the dismissal of the petition for intervention with the question of whether or not the trial court committed error in fixing the value of the property alleged to have been converted, or in entering judgment therefor, or in subordinating the claims of the defendant corporation to others, but solely with the right of the appellant to intervene in this action to protect her own rights, as distinguished from the rights of the respondent corporation, which

> are being actually litigated in good faith by the respondent corporation, and can be considered upon an appeal from the judgment. The order of the trial court, being an exercise of a sound discretion committed to it by the law, is not appealable."

This court in the late decision *State of Washington v. United States,* 87 Fed. (2d) 421, 433-435 gave thorough consideration to right of appeal from an order denying intervention and cited many cases. Applying the tests there announced it appears plainly that the petitions for appeal should be denied.

In *Palmer v. Bankers' Trust Co.* (8th C. C. A.) 12 Fed. (2d) 747, on page 752, the court says:

> "In each case the court is called upon to exercise its sound legal judgment. In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute. (Citing cases.) In other cases, the facts and circumstances may be such that the court is clearly justified in denying intervention. The mere matter of delay alone is often a decisive factor with the court. First Nat. Bank v. Shedd, 121 U. S. 74, 86, 7 S. Ct. 807, 30 L. Ed. 877; Central Trust Co. v. C., H. & D. R. Co. (C. C.) 169 F. 466, 472."

In *Lewis v. Baltimore & L. R. Co.* (4th C. C. A.) 62 Fed. 218, on pages 221-222 the court says:

> "No right of the petitioner has been finally adjudicated by any of the orders of the court. Besides, this refusal

of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right. In the language of Waite, C. J., in Ex Parte Cutting, 94 U. S. 22: 'No appeal lies from the order refusing them leave to intervene to become parties. That was a motion in the cause, and not an independent suit in equity, appealable here.' Were the courts of last resort to entertain appeals to make a person a party, causes would be constantly going up piecemeal, great confusion would be created, and insufferable delays caused. The petitioner, not being a party to the suit, cannot be heard on an appeal therefrom."

See also *Rodman v. Richfield Oil Co.* (9th C. C. A.) 66 Fed. (2d) 244, 251-252.

II. Leave to intervene was rightly denied because said stockholders were seeking to litigate issues already passed upon, other issues outside the purposes of the suit, and they sought dismissal of plaintiff's complaint and the amendments thereto.

Equity Rule 37 requires that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding". A considerable part of the answer and cross-bill and intervening petition is an attack upon the validity of the foreclosure proceedings that resulted in the sales held in 1896, at which the Railway Company acquired the property. The Master, in his report filed May 21, 1933, pages 200-203, ruled that the Railway Company is the lawful successor to the property and rights of the Railroad Company. Said ruling was adopted by the court in its order of October 3, 1935.

Two Attorneys General have ruled that the Railway Company is the lawful successor to the property and rights in

the land grants of the Railroad Company. Attorney General Harmon, February 6, 1897, Vol. 21 Op. Atty. Gen. 486; Attorney General Moody, April 12, 1905, Vol. 25 Op. Atty. Gen. 401. In *United States v. Northern Pacific Railway Company,* 256 U. S. 51, on page 58, the court said:

> "The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other."

These stockholders have no right to attempt intervention for the purpose of trying again an issue that was disposed of in this suit nearly two years before the filing of their answer and cross-bill.

In their pleadings the stockholders allege the invalidity of the corporate organization of Northern Pacific Railway Company, and that the United States Circuit Court for the Eastern District of Wisconsin had no jurisdiction in the foreclosure proceedings of 1893-1896. No such issues were raised by the Government in this suit. One of the motions denied by the order entered March 22, 1938 was the motion to dismiss the complaint and amended complaint. It is well settled that intervention is not permitted for such purposes.

In *Board of Drainage Com'rs. v. Lafayette Southside Bank of St. L.,* (4th C. C. A.) 27 Fed. (2d) 286, the court says:

> "This rule, in plain terms, permits intervention in subordination to, and in recognition of, the propriety of the main proceedings, hence to seek to intervene with the view of challenging the jurisdiction of the court, or otherwise inaugurating litigation not within the scope and purview of the original suit, is not permissible, and should be denied. Union Trust Co. v. Jones, 16 F. (2d)

236 (a decision of this court), and cases cited." (p. 296)

"The effort to intervene was in no sense one in recognition of the propriety of the main proceedings or intended to be subordinate thereto, but, on the contrary, was directly antagonistic to everything that was sought to be done in the main suit, and intended to contravene the same, and was filed therein after that suit had been pending more than two years." (p. 296)

(2) In *Whittaker v. Brictson Mfg. Co.,* (8th C. C. A.) 43 Fed. 485, the court says:

(p. 489) "While intervention under some circumstances may be a matter of right, if properly presented to the court, it is generally a matter of sound legal discretion exercised in line with recognized judicial standards in the interest of justice.

(p. 490) "In Mueller et al v. Adler, et al, 292 F. 138, 139, this court holds that under Equity Rule 37 an intervention for the purpose of attacking the jurisdiction of the court in the main suit is not permissible, and that a motion by an intervener to dismiss the main bill cannot be entertained.

(p. 490) "We quote from 11 Encyclopedia of Pleading and Practice, pp. 509, 510: 'An intervener in a suit between other parties must accept such suit as he finds it, and is bound by the record of the case at the time of his intervention. He cannot raise an issue as to whether the proceedings are regular, nor can he plead exceptions having for their object the dismissal of the action. He cannot raise new issues in the suit, nor insist upon a change in the form of the proceeding.'

(p. 491) "To seek to set aside the entire proceedings in a case and to have the same held for naught on the ground that they were absolutely void cannot be in recognition of the propriety of the main suit."

III. The delay and confusion that would result from permitting these stockholders now to inject their alleged grievance into this suit were sufficient grounds for denial of intervention.

Before the stockholders made the first gesture to come into the case, the time had expired in which to file exceptions to the report of the Master made pursuant to the order of April 21, 1936. Following the argument on exceptions last March, the court entered the order of March 22 that rules on most of the exceptions. However, the order provides:

> "It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and determined by the court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;
>
> *"It Is Ordered,* that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree."

Since then the parties have been working on necessary exhibits that will contain descriptions of more than 2,800,000 acres of land, the proposed Findings of Fact and Conclusions of Law, and proposed form of decree to be entered. The expectation is that the Government and the Railway Company and other defendants will appeal from the decree

to the Supreme Court. The intention of Congress is plainly enough expressed in the Act of May 22, 1936. Should the orderly hearing of this case in the Supreme Court be delayed or confused by four stockholders of the Railroad Company who now are attempting an appeal from orders that so manifestly are not appealable?

It is respectfully submitted that the petitions for appeal ought to be denied.

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June ———, 1938.